Filed 6/9/15 Marriage of Navratil CA1/1

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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| In re the Marriage of SUSAN JEAN and MARK J. NAVRATIL. | |
| SUSAN JEAN NAVRATIL,<br>Appellant,<br>v.<br>MARK J. NAVRATIL,<br>Respondent. | A142317<br><br>(San Mateo County Super. Ct. No. F 030896) |

## MEMORANDUM OPINION[1]

This lengthy and protracted dissolution litigation appears before us once again on the same two issues previously before us. Once again, on April 22, 2014, the trial court, among other things, terminated spousal support. The court cited no reason other than "it's time."[2] This is not a statutory reason for termination of spousal support after a 30-year marriage and so we will, once again, reverse that aspect of the court's order.

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[1] We resolve this case by a memorandum opinion pursuant to California Standards of Judicial Administration, section 8.1(1), (2), (3).

[2] There have been two prior appeals: *In re Marriage of Navratil* (Sept. 13, 2004, A103483 [nonpub. opn.] (*Navratil 1*)); and *In re Marriage of Navratil* (Feb. 9, 2011, A127929 [nonpub. opn.] (*Navratil 2*).) We take judicial notice of our prior opinions on our own motion. (Evid. Code, § 451.)

On May 1, 2014, the court made findings and orders after hearing that determined all support arrearages had been paid in full. The court also determined respondent Mark Navratil owed appellant Susan Navratil $90 in costs on her previous appeal. The court ordered respondent to pay that amount, plus interest at 10 percent from March 1, 2014. These orders are not contested and will be affirmed.[3]

Both parties appeared below, and in this appeal, in propria persona. The orders are appealable as postjudgment orders regarding support and awarding or denying costs. (Code Civ. Proc., § 904.1, subd. (a)(2); *Marriage of Brinkman* (2003) 111 Cal.App.4th 1281, 1287 [support arrears]; *Laken v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 654–655 [costs].)

## STATEMENT OF FACTS AND PROCEDURAL HISTORY[4]

### *Background Facts* [5]

Mark is 68 years old (or nearly so). Susan is 67 (or nearly so). The parties married in March 1966 and separated and divorced in November 1995. "The original judgment of dissolution was filed on February 3, 1998, but reserved judgment on the issues of child and spousal support. After a hearing on March 27, 1998, the court ordered Mark to pay to Susan spousal support . . . ." (*Navratil 2*, *supra*, A127929, at p. *2) "On October 30, 1998, the court found that a "change in circumstances" justified a modification of existing child and spousal support orders . . . for child care and child support." (*Ibid.*) "The parties continued to have joint legal custody of Sarah." (*Id.* at p. *2, fn. 3.)

"On June 3, 2003, in response to Mark's motion for modification of the existing spousal support order, the court . . . terminated 'all spousal support permanently and forevermore.' (*In re Marriage of Navratil*, *supra,* A103483, at pp. 4, 5.) The court also

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[3] We also deny Mark Navratil's requests to stay these proceedings, remove two declarations from the lower court index, and consider an unsigned order after hearing.

[4] For the sake of clarity and convenience we will refer to the parties by their first names.

[5] We summarize the essential background facts as stated in our prior opinions. (See fn. 2, *ante*.)

ordered Susan . . . to pay respondent's counsel . . . for attorney fees. (*In re Marriage of Navratil, supra*, A103483, at pp. 2–3)." (*Navratil 2*, *supra*, at pp. *2, *3.)

On September 13, 2004, this court reversed the trial court's order terminating spousal support to Susan and affirmed the attorney fee order. (*Navratil 1*, *supra*, A103483, at pp. *1, *6.)

On January 31, 2005, the superior court, Judge Steven Dylina presiding, implemented this court's opinion as follows: "This court modifies its previous order [terminating spousal support] to reduce spousal support from [Mark] to [Susan] to the sum of $100.00 per month commencing July 1, 2003 until further order of the court. This court finds that [Susan] has failed to meet the requirements of Family Code section 4505 and the court has considered all of the factors enumerated by Family Code Section 4320 in making this order. The order dated June 3, 2003, remains in full force and effect as to all other matters stated in said order. The court retains jurisdiction for any further modification of spousal support. A copy of said order will be served on the parties as well as the First District Court of Appeal, Division One."

"On July 28, 2009, a contested hearing was held before a court commissioner on Mark's request for reimbursement for medical care and child care expenses incurred from April of 1999, through May of 2000. . . . The commissioner denied Mark's claim for reimbursement for medical expenses, but granted him reimbursement from Susan of child care expenses. . . . [¶] Susan filed a motion for reconsideration on August 31, 2009 . . . . The commissioner . . . denied her motion for reconsideration." (*Navratil 2*, *supra*, A127929, at p. *3.)

On February 9, 2011, this court reversed the denial of Susan's motion for reconsideration and remanded the case to the trial court with directions to grant Susan's motion for reconsideration and deny Mark's motion for reimbursement of child care expenses. Susan was awarded costs on appeal. (*Navratil 2*, *supra*, A0127929, at p. *6.) The remittitur issued April 12, 2011.

***The Current Dispute***

On April 8, *2013*, the superior court, Judge Richard Dubois presiding, ordered: "After remand from the court of appeal, the order of 5-4-09 is modified to vacate the portion of that order requiring [Susan] to reimburse [Mark] $1,440 for child care expenses."

On December 20, 2013, Susan filed a motion for attorney fees and costs and spousal support with a hearing date of February 11, 2014. In a supporting declaration, Susan demanded $6,400 from Mark, consisting of $1,440 plus accrued interest since 2009 for monies she was ordered to pay Mark (which order was reversed by this court in 2011) and $5,000 in attorney fees. Susan also filed various letters and court documents as exhibits in support of her motion.

On January 27, 2014, Mark filed a responsive declaration contesting Susan's requests. He objected Susan had not filed an updated income and expense report, indicated she had previously signed court documents saying she did not have an attorney, and disputed he owed her money. He also appended various exhibits to his declaration. As for Susan's request for an increase in spousal support, Mark queried: "Has [*sic*] the information provided for a seven hundred percent increase in Spousal Support compelling? My response is that this is a substantial request and should be given due consideration." He requested a separate hearing and an updated income and expense declaration.

On February 6, 2014 Susan filed an amended request for attorney fees of $5,191.92 and an increase in spousal support from $100 to $700 a month. In her supporting declaration, Susan amended her demand to $6,631.92, plus interest. This amount included $5,191.92, for attorney fees she paid to a lawyer to "look into" why the trial court had taken no action to enforce this court's 2011 order, "and to address increasing my spousal support since it was set at such a ridiculously low amount." As she saw it, this court's 2011 opinion had effectively granted her reimbursement of $1,440 plus interest since 2009, and awarded her attorney fees. ($5191.92 + $1,440 = $6,631.92.) Susan included a statement of account from an attorney charging her

$2,111.91 for services rendered through September 30, 2013. As for her request for increased support from $100 to $700, Susan indicated the request was brought "due to a change in circumstances," and the requested increase was "more than fair, considering I received far more than that years ago."

On February 11, 2014, the court held a hearing on Susan's application. The court clarified Susan was asking for, among other things, the costs that were awarded on appeal. The court pointed out this court's opinion did not award her attorney fees, only costs. The court ordered Susan to submit a memorandum of the costs incurred on appeal by February 28, 2014. Mark was to respond by March 7, 2014.

The court indicated it would review the paperwork related to arrearages and took the matter under submission. The court denied Susan's request for modification of spousal support for lack of a current income and expense declaration. Susan indicated there was one submitted "last year." The court indicated the Rules of Court required an updated declaration, and denied the motion "at this time."

On February 25, 2014, Mark filed a request to *terminate* the existing order of $100 per month for spousal support. In support of his request Mark submitted, among other things (1) Susan's income and expense declaration filed December 23, 2003, listing net monthly income of $1,638 and total monthly expenses of $1,988 and (2) the trial court's 2005 order setting spousal support at $100. Mark compared the 2003 income and expense declaration with Susan's 2013 income and expense declaration, which listed monthly income of $2,307 and monthly expenses of $2,715. Mark also alleged Susan had more income and/or assets than she claimed on her 2013 income and expense declaration because she was cohabiting with another man. He appended photos of her appearing to enter a home in Salinas, California, and an older model GMC car with a license plate starting with the number 6.

On February 28, 2014, Susan filed a declaration regarding her costs on appeal with supporting documentation. She listed costs of $347. She also calculated that she was owed $2,036 plus 10 percent interest to satisfy the arrearages, following this court's order reversing the denial of her motion to reconsider.

On March 17, 2014, Mark filed a declaration in response to Susan's February 6, 2014 declaration, with accompanying exhibits relating to the contested arrearages, including a copy of a check written to Susan dated April 19, 2011 for $2,036.

On March 25, 2014, Mark filed an income and expense declaration averring he is 67.9 years old, has an income of $4,757 per month from social security and disability retirement, assets of $10,450, and monthly expenses of $5,394, of which $800 are paid by others. He appended 23 pages of documentation. He also submitted a declaration in support of his request for termination of spousal support. He averred Susan had never worked, had been self-supporting for three years due to her CALPERS pension and Social Security, was currently living with a Mr. Hansen in Salinas, California, and was in fair health.

On March 28, 2014, Judge Dubois sent both parties a letter asking if they were attempting to settle the matter and, if not, asking Susan to give him "a short concise outline of what you are requesting me to order and how you calculated it."

In response, on April 10, 2014, Susan wrote the parties had not resolved any of the issues, and "[Mark] was court ordered to pay me $7,730 which came from what [Mark] back owed me for alimony from June 2003. [Mark] to date has paid $5,694. The difference owed is $2,036 based on the minute order of 7/28/09 interest is applied at 10% interest dating back to June 2000. [¶] . . . [¶] The amount of interest owed only based on the amount owed currently is $203 per year . . . . That times $203 at 10% interests over the course of 13 years is $2,639. The costs and fees associated totaled $347.20. [¶] Thus I would like the court to order [Mark] based on the appeals award January 2011 the total amount of $3,765." Susan acknowledged Mark had paid $257 towards the costs.

On April 18, 2014, Susan filed a responsive declaration with exhibits attached rebutting the allegations in Mark's March 17 and March 25, 2014 declarations. In pertinent part, Susan outlined her work history from 1965 through 2001. She denied cohabiting with Mr. Hansen.

On April 22, 2014, the court held a hearing on Mark's February 25 request to terminate spousal support. The court noted Susan had not filed a current income and

expense declaration, which was required. Susan responded nothing had changed; she could file one that day. The court also stated: "[W]e're now 19 years post separation. Doesn't look like very much has changed relative to either one of you. Does that sound about right? At some point in time the support—the support is minimal in any event. At some point in time support has got to terminate." The court ruled: "It seems to me that in light of the lack of an income and expense declaration and accepting your representation your income has not substantially changed in the last year or so it still appears to me that it's time that the spousal support order be terminated." The court terminated spousal support effective May 1, 2014. The court also denied the request for payment of attorney fees.

On May 1, 2014, the court filed an order finding that by order filed June 17, 2009, Mark was found to be in arrears on support by $7,730. Susan acknowledged payment of $5,694. Mark provided the court with a copy of a cancelled check to Susan dated April 29, 2011 for the balance of $2,036. Therefore, the arrearages had been paid in full. The order also awarded Susan her costs on appeal of $347.20, of which she acknowledged payment of $257.20. Therefore the court ordered Mark to pay $90, with interest from March 1, 2014. The court found no other sums owing between the parties.

Susan timely appeals.

## DISCUSSION

### *Attorney Fees*

This court's 2011 opinion (*Navratil 2*, *supra*, A127129) awarded Susan costs on appeal, but not attorney fees. Accordingly, the trial court's order denying attorney fees is supported by substantial evidence and is affirmed.

### *Costs*

Susan requested payment of $357 in costs and was awarded $357 in costs, plus interest on the outstanding $90. Susan does not challenge this order in her briefs. The order is supported by substantial evidence. Therefore, the order is affirmed.

***Arrears***

The trial court calculated that Mark's obligation to pay arrears was satisfied by two checks totaling $7,730. Susan does not challenge the court's calculation or order in her briefs. The order is supported by substantial evidence. Therefore, the order is affirmed.

***Modification of Support to $700 Per Month***

The trial court denied Susan's request for an increase in support from $100 per month to $700 per month. Susan did not submit a current income and expense declaration despite having ample time to do so between February 11, 2014, and April 22, 2014. Nor did she give any reason for such an increase, save her own estimation that $100 a month was ridiculously low and less that she had received before. This is not sufficient justification for the modification requested. On this record, the trial court did not abuse its discretion in denying the request for increase and the order is affirmed.

***Termination of Spousal Support***

The trial court terminated spousal support for the stated reason that it did not "look like very much has changed relative to either one of you. Does that sound about right? At some point in time the support—the support is minimal in any event. At some point in time support has got to terminate. . . . [¶] . . . [¶] It seems to me that in light of the lack of an income and expense declaration and accepting your representation your income has not substantially changed in the last year or so it still appears to me that it's time that the spousal support order be terminated."

On review of a trial court's order regarding spousal support, we must uphold the court's decision unless the record demonstrates that the court abused its discretion. (See *In re Marriage of Christie* (1994) 28 Cal.App.4th 849, 856; *In re Marriage of Wilson* (1988) 201 Cal.App.3d 913, 916-917.) We once again we are constrained to find an abuse of discretion.

Family Code Section 4320 sets forth the factors the court must consider in exercising its discretion to grant, modify or terminate support. [6] "It's time" is not among

[6] Family Code section 4320 provides: In ordering spousal support under this part, the court shall consider all of the following circumstances:

"(a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following:

"(1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.

"(2) The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.

"(b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.

"(c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living.

"(d) The needs of each party based on the standard of living established during the marriage.

"(e) The obligations and assets, including the separate property, of each party.

"(f) The duration of the marriage.

"(g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.

"(h) The age and health of the parties.

"(i) Documented evidence of any history of domestic violence, as defined in Section 6211, between the parties or perpetrated by either party against either party's child, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party.

"(j) The immediate and specific tax consequences to each party.

"(k) The balance of the hardships to each party.

them. In 2004, we particularly noted that *except in the case of a marriage of long duration*, the "reasonable period of time" within which the goal of self-support hopefully is reached, is generally "one-half the length of the marriage." (Fam. Code, § 4320, subd. (*l*).) However, the court has the "discretion to order support for a *greater* or lesser length of time." (*Ibid.*, italics added.) (*Navratil 1*, *supra*, A103483, at p. *2.)

We also reminded the trial court that where the marriage is of long duration, after a judgment of dissolution, Family Code Section 4336 establishes that " retention of jurisdiction is the rule." (*In re Marriage of Ostrander* (1997) 53 Cal.App.4th 63, 66.) (*Navratil 1*, *supra*, A103483, at p. *4.) Our concern then, as now, is that, under Family Code section 4336, the effect of the court's order terminating support is to divest the court of jurisdiction it would otherwise retain to provide for changes in support in the event of changed circumstances that cannot now be anticipated, such as changes in income, or the catastrophic illness of either party. "A court is required to retain jurisdiction over spousal support after a lengthy marriage when a spouse may not be able to be self-supporting because of age or poor health." (*In re Marriage of Heistermann* (1991) 234 Cal.App.3d 1195, 1202.) We also noted nothing in Family Code section 4336 limits the court's discretion to terminate spousal support in later proceedings upon a proper showing of changed circumstances. (Fam. Code, § 4336, subd. (c).) (*Navratil 1*, *supra*, A103483, at p. *4, fn. 7.)

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"(*l*) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a 'reasonable period of time' for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties.

"(m) The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4324.5 or 4325.

"(n) Any other factors the court determines are just and equitable."

In 2004, we were also concerned with Susan's unjustifiable resistance "to clear directions from the court that she must keep records . . . ." (*Navratil 1*, *supra*, A103483, at p. *4.)

But all that is water under the bridge now. The parties are 68 and 67 years old and both are retired, living on (reduced) retirement income, hers more reduced that his, if anything can be deduced from the income and expense declarations in the record. It appears that Susan *remains* resistant to clear directions from the court that she keep records. This time, the records at issue are her declarations of income and expenses. And, she flouts the trial court's entirely reasonable directive that she file a current income and expense declaration if she wants the court to seriously consider her request to raise spousal support from $100 per month to $700 per month. Nevertheless, now as in 2004, "the drastic remedy of permanent termination of support, in the face of her recalcitrance, does not operate as an incentive for her to comply" with the rules of court. Instead, the court's order terminating spousal support "takes on the appearance of a punitive sanction, and is at odds with the strong policies reflected in [Family Code] section 4336 favoring retention of jurisdiction over issues of spousal support after a lengthy marriage and disfavoring termination of spousal support in the absence of some showing that the supported party is or will be self-supporting at the time of termination. [Citations.]" (*In re Marriage of Vomacka* (1984) 36 Cal.3d 459, 467–468; *In re Marriage of Morrison* (1978) 20 Cal.3d 437, 453; *In re Marriage of Prietsch & Calhoun* (1987) 190 Cal.App.3d 645, 659–667.) (*Navratil 1*, *supra*, A103483, at p. *4.)

A court has the power to modify or terminate an award of spousal support upon a material change of circumstance. (Fam. Code, § 3651, subd. (a).) Here, the trial court expressed the view that nothing much had changed between the parties. This observation militates against the modification of a support order. Moreover, any order modifying or terminating support *requires* consideration of *all* the relevant statutory factors. While a material change of circumstance may occur with the passage of time, passage of time, by itself, is not a sufficient basis for modification. (*Marriage of Heistermann, supra,* 234 Cal.App.3d at p. 1202; *Marriage of Gavron* (1988) 203 Cal.App.3d 705, 710;

*Marriage of Wilson* (1975) 51 Cal.App.3d 116, 119.) Terminating spousal support because "it's time" was an abuse of discretion.

Furthermore, under Family Code Section 4332, the court is required to make "specific factual findings with respect to the standard of living during the marriage." (Fam. Code, § 4332.) " 'The apparent legislative intent in mandating standard of living findings is to provide a record from which appellate courts can test "abuse of trial court discretion" in failing to properly consider the standard of living support guidelines. . . .' " (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 490.) Here, the court did not make any such finding. While that failure may not in every case warrant reversal (see, e.g., *In re Marriage of Khera & Sameer* (2012) 206 Cal.App.4th 1467, 1484), it is fatal here, where the court's stated reason for terminating support revealed its reliance on an erroneous basis for decision, and the record is otherwise opaque as to what statutory factors the court may have considered.[7]

**DISPOSITION**

The order terminating spousal support is reversed, and the matter is remanded to the court with directions to exercise its discretion to raise, reduce or terminate support after giving due consideration to the statutory factors listed in the Family Code, based on evidence of both parties' current circumstances. In all other respects, the court's orders are affirmed.

Each party shall bear its own costs.

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[7] We are aware that factual findings and a statement of decision are required only upon *request* of either party (Fam. Code, §§ 4332, 3654), and neither of these pro. per. parties made such a request. Nevertheless, we think the better practice is for the court to make factual findings and state reasons to facilitate appellate review, especially when the parties appear in propria persona.

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DONDERO, J.

We concur:

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MARGULIES, Acting P.J.

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BANKE, J.